BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* *Internet Over Cable Declaratory Ruling* *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*	GN Docket No.: 00-185 CS Docket No.: 02-52

COMMENTS OF THE CITY COALITION

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SUMMARY

The City Coalition does not agree with the determination by the Federal Communications Commission ("Commission") that cable modem service is an "information service" rather than a "cable service" and as such is not subject to local regulation. The Legislative history of the definition of "cable service" shows a deliberate expansion by Congress of its original meaning to include the provision of Internet and other advanced services. Moreover, the subsequent treatment of cable modem service by Congress in other legislation is consistent with its expansion of the cable service definition. The City Coalition finds sufficient evidence of Congress' intent that the definition of cable service include cable modem service, and that the provision of service remain subject to local oversight.

Irrespective of the regulatory classification given to cable modem service, local governments have independent authority under state law to regulate entities that operate within their corporate boundaries and use the public right-of-way ("ROW"). This authority is well established, and has been recognized by the Commission on several occasions. The Commission should not preempt this authority.

Local regulation of cable modem service serves many important public policy goals, such as:

- the prompt resolution of customer complaints;
- assures a minimum level of customer service;
- prohibits caps on speed or limitations on access;
- prevents adhesion contracts between subscribers and cable modem operators;
- provides assurances that technical upgrades and repairs will be made in a timely manner; and
- requires fair customer billing procedures and deposit requirements.

Should the Commission preempt the authority of local government to regulate the provision of cable modem service, it will have to provide an alternative means of ensuring these protections.

The Commission cannot assume that in the absence of regulation, competition in the marketplace will guarantee the continued application of these customer protections.

Continued supervision of cable modem service by local governments is important to promote competition and open access. Because cable modem service provides more attractive features than its one viable competitor, digital subscriber line ("DSL") service, it will soon develop into a natural monopoly. Without the oversight of a local regulatory body, many opportunities will exist for the cable modem operator to engage in anticompetitive behavior. Further, without local regulation, the customer will no longer have an accessible forum to bring a complaint. The combination of deregulation and the removal of an accessible forum will create market conditions conducive to the development of anticompetitive behavior.

The Commission should not preempt the local government's authority to impose open access requirements on the provision of cable modem service. Through the exercise of its independent authority, local governments have been able to ensure:

- nondiscriminatory access to transport facilities by unaffiliated Internet service providers ("ISPs);
- prevention of content control and routing by cable operators;
- a level playing field among different service providers;
- variety in the delivery of programming services; and
- even development and deployment of broadband services.

Because of their size and proximity, local governments have more flexibility to tailor regulations to reflect circumstances of the individual local market and to further the goals of the Cable and Communications Act. In contrast, few viable examples have been offered of the anticompetitive effect local regulation has had on the growth of cable modem service. Statistics on cable modem subscribers belay the claim that local government regulation has stifled the development of this market. Even assuming arguments that some local governments have over-regulated the

provision of cable mode service, total preemption of local authority would be a drastic and unreasonable remedy to address this concern.

Previously charged franchise fees were assessed by the local government under its authority to charge a fee for use of the public ROW. The authority of local governments to assess such a fee is determined under state law. The Commission should not adjudicate the validity of each local government's exercise of its independent authority. Disputes regarding the scope of such authority should be determined by state courts which are more familiar with the extent of local power.

The Commission should recognize that cable modem service is a "cable service" and subject to local regulation. In the alternative, the Commission should refrain from preempting local regulation and oversight of cable modem service. Local regulation promotes the goals of the Cable and Communications Act, and is important to ensure important customer protections.

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These comments are submitted on behalf of the cities of Apache Junction, Arizona; Albert Lea, Cannon Falls, Granite Falls, Hastings, Lakeville, Prior Lake, Red Wing, Rochester, Sauke Centre, Savage, St. Louis Park and Winona, Minnesota; the member cities of the Northern Dakota County Cable Communications Commission (Inver Grove Heights, Lilydale, Mendota, Mendota Heights, Sunfish Lake, South St. Paul and West St. Paul, Minnesota); the member cities of the Southwest Suburban Cable Commission (Eden Prairie, Edina, Hopkins, Minnetonka and Richfield, Minnesota); the member cities of the San Mateo Telecommunications Authority (Atherton, Belmont, Brisbane, Burlingame, Daly City, Foster City, Hillsborough, Millbrae, Redwood City, Portola Valley, San Bruno, San Carlos, San Mateo, county of San Mateo, South San Francisco and Woodside, California); Eau Claire, Wisconsin; Norfolk, Virginia; Ogallala, Nebraska (collectively, the "City Coalition") in response to the Declaratory Ruling and Notice of Proposed Rulemaking ("*Declaratory Ruling*") released by the Federal Communications Commission ("Commission") on March 15, 2002, in the above referenced proceeding.

The City Coalition has approximately 1,475,721 residents of which over 370,000 are subscribers to cable television.

INTRODUCTION

The Cable Act directs the Commission to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[1] In the *Declaratory Order*, the Commission has issued a decision that will have the opposite result.

Regulation of cable modem service by local governments promotes important public policy goals. Classifying cable modem service as an "information service" rather than a "cable service" will eliminate the oversight of local government, resulting in disparate regulatory treatment between service providers and anticompetitive arrangements between affiliated entities. The result will be fewer information sources and choice of services offered to the subscriber. This consequence represents the antithesis of the goals contained in the Cable Act.

I. CABLE MODEM SERVICES IS A "CABLE SERVICE" AND SHOULD BE RECOGNIZED AS SUCH FOR REGULATORY PURPOSES

In the *Declaratory Ruling* the Commission reviewed the statutory language and legislative history of the terms "telecommunications service," "information service," and "cable service" before deciding that cable modem service was an "information service" for purposes of regulation.[2]

The City Coalition does not agree that cable modem service was intended by Congress to be an "information service." For important public policy reasons cable modem service, and

[1] 47 USC § 521(4).

[2] *Declaratory Ruling,* at ¶ 33.

other services like it, have been regulated by local governments as a "cable service" for over thirty years.[3] Further, the recent legislative history regarding amendments to the definition of "cable service" clearly indicate Congress' intent that cable modem service would remain subject to regulation as a cable service.

A. Cable Modem Service Meets the Definition of "Cable Service"

The Cable Communications Policy Act of 1984 ("Cable Act") defines "cable service" as the "one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.[4] This definition of cable service is broad and encompasses the provision of Internet over a cable modem. As stated in the *Initial Comments* of the Local Government Coalition in this proceeding:

> A cable operator is providing subscribers "one-way transmission of video programming" and "other information that a cable operator makes available to all [cable modem] subscribers generally." And the cable modem service includes the "subscriber interaction . . . required for the selection or use of" that video programming and generally available information. The subscriber selects the information available through the cable modem service that the cable operator transmits that information from the head-end to the subscriber. What the cable operator transmits is not always "video programming" (though broadband access to the Internet will make that increasingly the case), but it is "other programming," as defined by the Cable Act, i.e. "information that a cable operator makes available to all subscribers generally."[5]

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[3] *See Cable Television Report and Order,* 36 FCC 2d 143 (1972) (recognizing the vital role of local government in the regulation of cable television because cable made use of the public right of way, and because local authorities brought a special expertise to the practical regulation of the industry).

[4] 47 USC § 522 (14).

[5] *In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No: 00-185, Initial Comments of the Local Government Coalition, at 7 (December 1, 2000) ("*Local Government Comments*").

Some commenters have suggested that Internet access does not meet the definition of cable service because the transmission of e-mail over the Internet involves a private communication between the sender and the recipient. However, this reasoning ignores an important component of cable modem service, which permits:

> [A]ll subscribers the *same* access to the *same* web sites, to join in the *same* chat rooms, to scan the *same* message boards, and to obtain the *same* "generally available" Internet information. It is the cable operator that makes the "information" "generally available" to each cable modem subscriber. Each subscriber then interacts with that generally available information and chooses the specific information desired, using his or her own computer to manipulate that information, or to send private inquiries or responses to it. Whether cable modem service is a cable service is not determined by how a subscriber uses the Internet information once the subscriber has selected and the cable operator has provided it to the subscriber.[6]

The City Coalition supports the analysis of the Local Government Coalition. The appropriate emphasis for the Commission's inquiry is not what the subscriber does with the information it received from the Internet, but rather, the interaction between the subscriber and the services offered by the cable modem operator.[7] An examination of this relationship is clearly limited to the general provision of data by the cable modem operator, with its selection and use by the subscriber. This level of interaction between the subscriber and the cable modem operator is the essence of the "cable service" definition.

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[6] *Local Government Comments*, at 7-8 (emphasis in original).

[7] As noted by the Local Government Coalition, the routing mechanisms of TCP/IP does not define the actual services provided through the Internet to end users. But rather, the cable operator is providing a form of "electronic menu" which allows each subscriber to obtain information using the Internet's TCP/IP protocols. *See Local Government Comments,* at 8, n. 11, *citing* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, Federal Communications Commission, Office of Plans and Policy, OPP Working Paper No. 30, (August 1988).

B. Review of Legislative Intent Supports a Finding that Cable Modem Service is a "Cable Service"

An examination of the legislative history of the "cable service" definition provides further support for the conclusion that cable modem service is a "cable service" for purposes of regulation.

Prior to the passing of the Cable Act in 1984, the Commission adopted regulations prohibiting telephone companies from providing cable television service to subscribers.[8] These regulations were intended to prevent abuse by telephone companies of the local network and preserve a competitive environment for the development of broadband cable facilities and services. In 1984, Congress enacted legislation that codified these regulations, including the prohibition against the provision of cable service by telephone companies.[9] To further draw a distinction between the provision of cable and telephone service, the Cable Act exempted cable television operators from common carrier regulation and preserved the traditional role of the local government in regulating these services.

One of the driving factors behind the Cable Act was the recognition that cable systems were capable of delivering both traditional one-way television programming and two-way data and voice transmission services.

> Local cable systems began to develop the capability to provide services other than those essentially resembling television broadcast. This included two-way communications services through which subscribers could call up programming or communicate over the cable system, and institutional networks with the capability to provide the full range of communications and data transmission services to government and educational institutions and private businesses.[10]

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[8] *See Telephone Company-Cable Television Cross-Ownership Rules*, *Sections 63.54-63.58*, 2 FCC Rcd 5092 (1987).

[9] *See* 47 CFR § 521, *et. seq*.

[10] H.R. REP. NO. 934, 98th Cong., 2d Sess. 19-23 ("*House Report*")

The definition of "cable service" was drafted to prevent cable systems that delivered video programming from being treated as common carriers, while preserving the existing federal and state regulatory authority over the future provision of non-traditional broadband communications services.

The capacity for two-way transmission services over the cable network raised concerns of telephone subscriber by-pass of the regulated local exchange networks in favor of a potentially unregulated provision of voice and data by the cable operators.[11] Congress reacted by drawing a line between cable service and other communications services delivered over a cable system:

> The Committee intends this definition of cable service to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under Section 621(c) and all other communication services that could be provided over a cable system.[12]

To prevent bypass of the local telephone company, the Cable Act defined the term "cable service" as the one-way transmission to subscribers of video programming or other programming service together with subscriber interaction, if any, which would be required for the selection of such programming.[13] The legislative history behind this definition makes it clear that Congress intended to "exempt video programming from common carrier regulation in accordance with the traditional conception that the one-way delivery of television programs, movies, sporting events

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[11] *House Report,* at 27-29. Congress cited several state and federal investigations examining regulatory approaches to alternative supplies of local private line services and the potential for bypass.

[12] *House Report,* at 41.

[13] 47 USC § 522 (6).

and the like is not a common carrier activity."[14] The definition of cable service in the Cable Act was narrowly tailored to achieve this result.

In the *Declaratory Ruling*, the Commission relied upon the "one-way transmission" aspect of the 1984 definition as a clear indication of Congress' intent to limit the definition of "cable service" strictly to the one-way delivery of television programming, movies and sporting events, and to exclude two-way transmissions, such as the provision of Internet over a cable modem.[15] However, the Commission's reliance is misplaced, as it ignores both the purpose of the 1984 definition of cable service, and the purpose behind its subsequent amendment in 1996.

Congress stated in 1984 that the distinction between cable services and other services offered over cable systems was "based upon the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities of cable systems."[16] Congress listed the services it intended to exclude as "services providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data" from the definition of cable service.[17] This legislative history indicates that the provision of interactive information and enhanced services was not intended to come within the original definition of cable service. Clearly, had the 1984 definition of "cable service" remained unchanged, it would have excluded the provision of Internet-based services.

However, subsequent to the passage of the Cable Act, Congress began to blur the lines between the provision of cable service and the provision of telecommunications service. In 1995

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[14] *House Report,* at 41.

[15] *Declaratory Ruling,* at ¶ 67.

[16] *House Report,* at 42.

[17] *House Report,* at 42.

Congress proposed the Telecommunications Competition and Deregulation Act which would remove the prohibition against the provision of cable service by local telephone companies.[18] This prohibition was also successfully challenged in federal court.[19] With the opening of the cable market to local telephone companies, it became less crucial for the definition of "cable service" to exclude all aspects of providing telecommunications services.[20]

In 1996, Congress amended the 1934 Communications Act ("Communications Act") and expanded the definition of "cable service" beyond the mere selection of video programming to include the use of such programming by the subscriber.

> Cable service is a (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection **or use** of such video programming or other programming service.[21]

Although the 1996 definition retained the "one-way transmission" aspect of the original definition, it also described the transmission of information originating from the subscriber for the purpose of selecting *or using* a programming service. The addition of the "or use" language to the definition of "cable service" expanded its application to services not originally

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[18] Telecommunications Competition and Deregulation Act of 1995, S. 652, H.R. 1555, 104th Cong., 1st Sess. (1995).

[19] *See US West, Inc. v. United States,* 48 F.3d 1092 (9th Cir. 1994) (finding the prohibition against the provision of cable service by telephone companies within their service territory violated the First Amendment).

[20] *See Comments of the National League of Cities,* GEN Docket No.: 00-185 at 8 (December 1, 2000) (finding the non-common carrier/common carrier line drawn by Congress in the Cable Act indicative of its intent behind the original definition of "cable service").

[21] 47 USC § 522(6) (emphasis added).

contemplated in the original definition. The Conference Report for the amendment confirms that this was Congress' intent when amending the definition:

> The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and **information services made available to subscribers by the cable operator, as well as enhanced services**. [22]

This legislative history clearly illustrates Congress' intent to expand the definition of "cable service" beyond the one-way transmission of data to include the provision of interactive "information services" and "enhanced services" by cable operators. This amendment expanded the definition of cable service to include the provision of services over cable facilities not envisioned at the time of the 1984 Cable Act, such as Internet.

Conversely, there is nothing within the legislative history of the 1996 amendment that would suggest that Congress intended to exclude the provision of Internet from this expanded definition of cable service. Had Congress wished, it could have maintained the original definition of cable service in the Cable Act, or explicitly narrowed the definition of cable service in 1996 to exclude everything but the one-way transmission of video. Instead, Congress amended the original language to increase the range of the term's application.

The expansion of the cable service definition clearly indicates Congress' intent to include the provision of Internet within the scope of cable service. The City Coalition is not aware of any commenter prior to the *Declaratory Ruling* that has provided a reasonable explanation of what services would be included in the expanded definition of "cable service" if the provision of Internet was excluded. There would be no purpose behind the 1996 amendment to the cable service definition if it were not to expand its application.

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[22] H.R. REP. NO. 458, 104th Cong., 2d Sess. at 169 (January 31, 1996) (emphasis added).

C. Subsequent Legislation Confirms that Congress Did Not Intend Any Change in the Regulatory Treatment of Cable Modem Service

Since the 1996 amendment to the "cable service" definition, Congress has not taken any action that would indicate its intent to remove cable modem service from regulation by local governments as a cable service. To the contrary, both in 1996 and after Congress has specifically preserved the authority of local government to regulate the provision of service over cable facilities.

In 1996, Representative Dingell commented on how the revised definition of cable service would affect local franchising authorities' revenues from the receipt of cable franchise fees:

> This conference agreement strengthens the ability of local governments to collect fees for the use of public right-of-way. For example, the definition of the term "cable service" has been extended to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees. [23]

This statement by Representative Dingell clearly indicates Congress' intent that local government authority had been "extended" beyond traditional cable service to include "other interactive services."

Two years later, Congress passed the Internet Tax Freedom Act ("ITFA").[24] The ITFA was enacted to provide a three-year moratorium on the ability of state or local government to impose a tax on Internet access.[25] The ITFA defines a tax in subsection A, and expressly exempts cable modem service in subsection B:

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[23] 142 CONG, REC. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

[24] PUB. L. NO. 105-277, Title IX, 112 Stat. 2681-719 (1998).

[25] *Id.* at § 1101(a).

> (A) Tax – In general. – The term "tax" means – (i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and it not a fee imposed for a specific privilege, service, or benefit conferred; or (ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.
>
> (B) Exception – Such term does not include any franchise fee or similar fee imposed by a state or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 USC 542, 573), or any other fee related to obligations or telecommunications carriers under the Communications Act of 1934 (47 USC 151 et. seq.).[26]

The ITFA applies strictly to the provision of Internet service. Subsection B addresses a "franchise fee" imposed by a local government entity. The only Internet service provided by cable operators subject to a franchise fee is cable modem service.

In the *Declaratory Ruling*, the Commission states that the exemption of franchise fees from the ITFA does not indicate Congressional intent to address or amend the statutory definition of "cable service" in the Communications Act.[27] The Commission is correct. The passing by Congress in 1998 of the ITFA containing an exemption for franchise fees on the provision of Internet in no way alters the actual definition of "cable service." However, the exemption would not have been necessary had Congress not expanded the definition of cable service in 1996 to include the provision of Internet.

The ITFA recognizes that a local franchising authority has the authority to charge a cable operator a franchise fee for its cable modem services to provide Internet. If cable modem service did not fall within the definition of "cable service" there would have been no need to specifically exempt franchise fees from the ITFA, and this section of the Act would be superfluous. By including the reference to Section 542 within legislation imposing a moratorium on Internet

[26] *Id.* at § 1104(8)(B).

[27] *Declaratory Ruling,* at 42.

taxation, Congress clearly indicated that access to the Internet is a "cable service" when provided over a cable system.

II. REGARDLESS OF A PARTICULAR REGULATORY CLASSIFICATION LOCAL GOVERNMENT REGULATION OF CABLE MODEM SERVICES IS PERMITTED AND IS IMPORTANT TO LOCAL RESIDENTS

In the *Declaratory Ruling* the Commission asserts its jurisdiction over the provision of cable modem service based on its conclusion that cable modem service is an "information service."[28] While the Commission recognizes that cable modem service utilizes the local cable network, it invites comment on whether local regulation of a cable modem operator's use of the public ROW should be preempted to further the broadband policy goals contained in the Communications Act.[29]

While the Commission may have the authority under the Communications Act to preempt some local regulation in instances of conflict with federal policy, its preemption of local ROW regulation is inappropriate and unprecedented. Local government authority over the public ROW is derived from grants of authority under state law, and is recognized in both the Cable Act and the Communications Act. An alteration in the classification of cable modem service does not change the local government's independent authority to regulate the use of the public ROW by a cable operator.

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[28] *Declaratory Ruling*, at ¶ 96.

[29] *Declaratory Ruling*, at ¶ 98.

A. The Classification of Cable Modem Services as an "Information Service" does not Limit the Local Government's Authority to Regulate the Public ROW

In the *Declaratory Ruling* the Commission acknowledges that it has long recognized the "important responsibility of local and State governments to manage the rights-of-way."[30] The Commission then inquires how its classification of cable modem service as an interstate information service will affect a cable modem operator's ability to access the ROW as necessary to provide service.[31] The answer is simple, it does not. Irrespective of its regulatory classification, a cable modem operator will utilize the ROW pursuant to a franchise, license or permit granted by the local government. No ROW user is allowed access to the public streets without first receiving a license to do so from the local government, and there is no compelling reason to make an exception for the provision of cable modem service.

With regard to regulation of the public ROW, the authority of local governments is well established.[32] Where the local government has the authority to regulate the public ROW, it also has the power to charge a fee for its use.[33] Even if the local government does not have the authority to regulate the provision of a particular service, it retains its authority to charge a fee

[30] *Declaratory Ruling,* at ¶ 101.

[31] *Id.* at ¶ 102.

[32] 12 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.01 (3d ed. 1997). All of the local government entities in the City Coalition have delegated authority under state law to regulate the use of the public ROW.

[33] *See St. Louis v. Western Union Tel. Co.,* 149 US 465, 13 S.Ct. 990 (1893) (stating that "the power to require payment of some reasonable sum for the exclusive use of a portion of the streets" was within the grant of power to local government to regulate the use of the streets). Some state law requires that a grant by a local government must be made for consideration of profit to the municipality, without which the license is invalid. 12 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.37 (3d ed. 1997).

for the maintenance and use of the public ROW.[34] Local regulation of the public ROW is an appropriate means of balancing the welfare and safety of local residents with the large private interest in the use of the public streets. Local governments are better equipped to balance these interests, as regulation of the local ROW would be administratively burdensome and inefficient (if not cost prohibitive) at the state or national level.[35]

To ensure that both public and private interests are served equally, consent from the local government is a precondition for any utility to use the public ROW.[36] Through the grant of a

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[34] *See* 12 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.36 (3d ed. 1997). For example, the local government can still manage and collect a fee from the telephone company for the use of the ROW, even though it cannot regulate the provision of telephone service. *See* 47 USC § 253(c) (limiting the regulatory power of municipalities to "managing the public rights-of-way or to requiring fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way") *and TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000) (upholding City's ability to charge a fee from a telephone company for its use of the public ROW).

[35] *See Cable Television Report and Order,* 36 FCC 2d 143, 207 (1972) (stating that direct federal licensing of the thousands of cable systems operating in large and small communities throughout the country would place an unmanageable burden on the Commission).

[36] The idea that the public ROW cannot be used without license is a long-established principal. The U.S. Supreme Court stated in 1888 that:

> [A] franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise.

franchise or license, the local government can ensure non-discriminatory access among ROW users and can make all necessary and reasonable regulation in the interest of public safety and convenience.[37] Without the consent of local government, there is no inherent right for a business to use the ROW.[38] Thus, use of the public ROW by a business is a privilege authorized through franchise, license or contract issued by the local government.[39]

As it acknowledged in the *Declaratory Ruling*, the Commission has long recognized that the use of the public ROW for cable systems required regulation by local governments.[40]

> [L]ocal government are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts.[41]

Prior to the passing of the Cable Act, the Commission stated:

> The ultimate dividing line, as we see it, rests on the distinction between reasonable regulations regarding the use of the streets and rights-of-ways and the regulation of the operational aspects of cable communication. The former is **clearly within the jurisdiction of the states and the political subdivisions**. The latter, to the degree exercised, is within the jurisdiction of the Commission.[42]

California v. Central Pacific Railroad Company, 127 US 1, 56, 8 S.Ct. 1073 (1888). *See also* 12 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.03 (3d ed. 1997).

[37] 7A MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.565 (3d ed. 1997).

[38] *Id.* at § 24.566.

[39] It is only in instances where the provision of service does not actually utilize the public ROW that a local government's ability to charge a franchise fee has been successfully challenged. *See City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999) (finding SMATV provider did not need to obtain a franchise where it did not use the public ROW).

[40] *See Duplicative and Excessive Over-Regulation of Cable Television,* 54 FCC 2d 855 (1975) *and New York State Commission of Cable Television v. FCC*, 749 F.2d 804 (1984).

[41] *Cable Television Report and Order* 36 FCC 2d at 207; *Earth Satellite Communications,* at ¶ 22.

[42] *Duplicative and Excessive Over-Regulation of Cable Television* at 861 (emphasis added).

Based on this principle, the Commission has only preempted local regulation where it found that the provision of service did not involve the use of the public ROW.[43] Where the cable system utilized the streets and public ROW to operate, the Commission clearly recognized the authority of the local government to impose conditions and a fee for its use.

The subsequently passed Cable Act required a cable operator to obtain a franchise from the local government before it could use the local ROW to provide cable service.[44] Exceptions to the local government franchise requirement existed only where the use of the public ROW was not necessary to provide service.[45] In all other instances, the Cable Act explicitly preserved the authority of state and local government over the provision of services over the cable system, including non-cable service.

> Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or **other communications service** provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.[46]

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[43] *See, for example, In re Earth Satellite Communications, Inc.,* 55 Rad. Reg.2d (P&F) 1427 (1983) (exempting SMATV where service was provided by satellite over coaxial cable to large apartment buildings, and did not involve the use of the public ROW) *and In re Orth-O-Vision, Inc,* 69 FCC 2d 178 (1980) (exempting multipoint distribution service that delivered cable by microwave and not through the use of the ROW).

[44] *See,* 47 USC § 541(b).

[45] *See* 47 USC § 522(6)(B) (1988) (exempting multi-unit dwellings from local regulation unless such facility used the public right-of-way) *and* 47 USC § 522(7)(B) (reflecting the 1996 amendment to the "cable system" definition to exempt "a facility that serves subscribers without using any public right-of-way").

[46] 47 USC § 542 (h) (1) (emphasis added).

These provisions in the Cable Act clearly illustrate that local regulation is preempted only in instances where the provision of cable or other communications services do not require the use of the public ROW to operate.[47] Under this regulatory framework, Congress has consistently upheld the local government's authority over the use of the public ROW.

The regulation by local governments of cable facilities located within the ROW is consistent with the treatment of other ROW users. All ROW users, whether the provision of service is regulated by the local government or not, are required to pay a fee to the local government toward the maintenance and use of the public ROW. There is no compelling reason why cable modem service should be exempted from this requirement.

For example, imagine a city where telecommunications providers and cable service providers have placed facilities in the public ROW. The telecommunications provider pays the city $.60 per access line for its use of the ROW. The cable service provider pays the city 5% of its revenues for its use of the ROW. The city is then approached by an "information service provider" regarding its access to the ROW. The information service provider will place its facilities in the ROW next to those of the telecommunications provider and the cable service provider, increasing the burden on the ROW. Is it in the public interest to allow the information service provider access to the ROW for free, without any provision for the additional burden on the ROW?

If the information service provider did not pay a fee for access and use of the ROW, its associated costs would have to be borne by the other ROW users, the local government entity

[47] *See City of Chicago v. FCC,* 199 F.3d 424, 433 (7th Cir. 1999) (recognizing that the preeminent policy reason for local regulation of cable service in the Cable Act is the use of the public ROW; upholding the Commission's preemption of SMATV regulation by local government where use of the local ROW was not at issue).

and its taxpayers. Under these circumstances, the telecommunications provider, the cable provider, the local government and the citizen taxpayers would be subsidizing the use of the public ROW by the information service provider. The subsidization of one service provider by other service providers is unprecedented, and anticompetitive.

Another consideration is the potential for conflict between citizens and the information service provider. The information service provider will require periodic maintenance of its facilities, involving future disturbance of the streets and public walkways. The provision and maintenance of these facilities could foreseeably damage private property abutting the ROW, causing complaints from the city's citizenry. If the local government does not regulate the information service provider, or its use of the ROW, there is no way to ensure its compliance with local regulations or provide a forum for citizen complaints.

Even if cable modem service remains classified as an "information service," local governments clearly should retain their longstanding authority to regulate the provision of communications services over facilities located in the local ROW. Irrespective of the Commission's decision regarding the classification of cable modem service, it should not attempt to preempt the authority of local governments over the use of the public ROW within its boundaries. To do so is contrary to its own precedent, public policy and the provisions of both the Cable Act and the Communications Act.

B. Continued Local Government Regulation of Cable Modem Service is Necessary to Ensure the Protection of Customer Interests and Should not be Preempted by the Commission

The Commission has solicited comment in the *Declaratory Ruling* on whether regulation by local governments of a cable operator's access to the ROW will impede competition and

impose unnecessary delays and costs on the development of new broadband services.[48] Local government regulation of cable modem service provided over the cable system located within the public ROW has been on-going since the inception of this technology.[49] Cable operators have paid franchise fees for their use of the public ROW since before enactment of the Cable Act. There is nothing to indicate that such regulation has impeded the development of either competition or deployment. To the contrary, between 1998 and 1999, cable modem service increased over 200%, from 350,000 subscribers to well over a million.[50]

Industry statistics indicate that the market for cable modem service will continue to grow. During 2001 and 2002, the number of television households was reported to be 102.2 million.[51] In 2001, cable operators passed 97.1% of all television households. Given the relatively low penetration of cable modem service (estimated to be less than 10% nationally) among the 70 million subscribers served by cable operators, an immense unsold market exists for potential new cable modem subscribers.

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[48] *Declaratory Ruling,* at ¶ 104.

[49] Local governments have exercised their police powers to require franchise terms and conditions that are responsive to community needs since before the Cable Act. *See TV Pix., Inc. v. Taylor,* 304 F. Supp. 459 (D. Nev. 1968) *aff'd per curiam* 396 US 556 (1970) (upholding local regulation of interstate broadcasting facilities where such facilities involved the location of cable equipment in the public streets and ways).

[50] *See, e.g. In the Matter of the Inquiry Concerning the Deployment of Advanced Telecommunications Capability,* CC Docket No. 98-146, SECOND REPORT at ¶ 72 (rel. Aug. 21, 2000).

[51] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No.: 01-129, EIGHTH ANNUAL REPORT at ¶ 17 (rel. January 14, 2002).

The Commission should consider the anticompetitive effect of eliminating local government's traditional role as a regulator of cable modem service. Continued supervision of cable modem service by local governments serves several important public policy goals:

- the prompt resolution of customer complaints;
- ensures a minimum level of customer service;
- prohibits caps on speed or limitations on access;
- prevents adhesion contracts between subscribers and cable modem operators;
- provides assurances that technical upgrades and repairs will be made in a timely manner; and
- requires fair customer billing procedures and deposit requirements.

Subscribers have come to expect that the local government will ensure these and other protections in the provision of cable modem service. If the Commission eliminates the role of local governments as the watchdog of customer interests, it must consider what motivation a cable operator will have to ensure that these interests continue to be served.

Local governments are in a better position to evaluate local conditions to effectuate good public policy. For example, as discussed in the Reply Comments of the City and County of San Francisco:

> In communities where there is significant competition for high-speed Internet access, there may be no need for local governments to act. In other communities where a cable operator that is refusing to negotiate with ISPs is the only provider of high-speed Internet access, local governments may feel the need to step in to require cable operators to provide open access to their transport facilities.[52]

It is for this reason that Congress preserved the franchise requirement in the Cable Act rather than replacing it with a system of federal permits.[53] Congress also preserved the authority of the

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[52] *Reply Comments of the City and County of San Francisco,* GN Docket No.: 00-185 at 9 (January 10, 2001).

[53] *Reply Comments of the City and County of San Francisco,* GN Docket No.: 00-185 at 9, n. 22 (January 10, 2001) *citing House Report* at 19 (stating that Congress adopted a policy that continued to rely on the local franchising process as the primary means of cable television regulation) *and City of New York v. FCC,* 486 US 57, 67 (1988) (noting that Congress continued

local government to establish and enforce customer protection standards and laws, even where these standards exceeded those of the Commission.[54]

The *Declaratory Ruling* preempts the authority of the local government to regulate the provision of cable modem service, and yet it makes no alternative provision for customer protection. The Commission cannot assume that in the absence of regulation by the local governments, competition within the local market will ensure the continued existence of these customer protections.

III. CONTINUED LOCAL GOVERNMENT AUTHORITY OVER CABLE MODEM SERVICE WILL DISCOURAGE ANTICOMPETITIVE BEHAVIOR

The Commission has stated that one of the "overarching principles" guiding its decision in the *Declaratory Ruling* is to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[55] The positive market conditions referred to by the Commission were developed under the direct regulatory guidance of local governments. Eliminating the role of the local government in regulating cable modem service will not further the current development of a free market, but rather, will create conditions conducive to anticompetitive behavior.

A. Sound Public Policy Requires That Local Governments Retain the Ability to Police the System

In availability and deployment, cable modem service has outstripped its only real competitor, DSL service. Because cable modem service provides a faster connection to the

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to permit the local franchising authorities to regulate man aspects of cable service, facilities and equipment).

[54] *See* 47 USC § 552(a)(1), (d)(1) & (2).

[55] *Declaratory Ruling,* at ¶ 4, *citing* 47 USC § 320(b)(2).

Internet than DSL and has the potential to offer voice phone service, it will eventually eliminate any remaining interest in this service. Recent figures place cable modem subscribers at 7.2 million, far greater than the current 3.4 million DSL subscribers.[56] Without a viable competitor, cable modem service will develop into a natural monopoly. Because cable modem service has this potential, it is imperative that some regulatory oversight be maintained to prevent anticompetitive behavior.

As noted in the Comments of the City of Los Angeles, without the oversight of a local regulatory body, the opportunity exists for a cable operator to utilize its provision of cable modem service in an anticompetitive manner.

> A cable operator, under current conditions, can provide cable modem service and limit access to only an affiliated ISP. That subscriber then has to accept that choice or migrate to a different delivery system. A cable subscriber may have the freedom to migrate to other delivery systems, if necessary. However, with a cable system already installed in a subscriber's home, it is less likely that subscribers will go through the expense, time and inconvenience of shifting their Internet services to another form of delivery. The ease of merely calling one's cable operator to add the cable modem service puts cable operators in the dominant position wherever they provide such service. This truism, coupled with the fact that DSL continues to be unavailable for most residential subscribers, leaves the cable operator as the only broadband provider of Internet service in most residential areas.[57]

The City Coalition agrees that the near monopoly enjoyed by cable modem service raises the potential for tying arrangements between the cable operator and other service providers. Customers should not be beholden to the ISP chosen by their cable operator for either convenience or profit. Yet, if the cable modem operator is not answerable to some regulatory body, and customers have no real alternative, there is nothing to prevent such anticompetitive

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[56] PAUL ANDREWS, BIG PIPE DREAMS, US NEWS AND WORLD REPORT, May 13, 2002, at 36.

[57] *Comments of the City of Los Angeles Regarding High Speed Access to the Internet,* GEN Docket No.: 00-185 at 16-17 (December 1, 2000).

arrangements. If the Commission preempts regulation by local governments, it must assume an oversight role to prohibit such anticompetitive behavior.

If the Commission preempts local regulation of cable modem service it will also remove a valuable and necessary service offered by local governments to their citizenry: a forum where customers can bring a complaint before a decision maker with the authority to effect change. By preempting local government regulation, the Commission will have removed any incentive for a cable modem operator to comply with local customer regulations and local governments will no longer mediate such disputes. Based on the growing number of customers who use cable modem service and the Internet, this will dramatically increase in the number of complaints filed with the Commission.[58] The City Coalition asserts that its citizenry should have a central accessible place to bring a complaint against a cable modem operator for prompt resolution. The *Declaratory Ruling* makes no provision for such a service.

The nature of many complaints are uniquely local, and are more efficiently resolved at the local level. Many cable modem customers also receive cable service from the cable operator. These multi-service customers then receive a combined bill, make their inquiries to a combined call center, and receive both services over one physical cable network. The result is that many customer complaints involving cable modem service will be inextricably intertwined with the provision of cable service. Yet, under the Commission's *Declaratory Ruling*, when the multi-service customer has a complaint regarding the service it receives from the multi-service cable operator, it will have to register its complaint in two different forums.

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[58] The National Telecommunications and Information Administration estimates that nearly half of America, 143 million people, were online as of September 2001. *A Nation Online: How Americans Are Expending Their Use of the Internet,* National Telecommunications and Information Administration, released February 2002 at http://www.nita.doc.gov/ntiahome/dn/index.html.

For example, in the Northern Dakota County suburbs of the St. Paul/Minneapolis Metropolitan Area, the following customer complaints have been registered with the local government entity: (1) alleged violations of a local ordinance prohibiting door-to-door solicitation by sales persons promoting new advanced services available on a newly upgraded cable system (including digital T.V. and cable modem service); (2) the threatened disconnection of a cable service customer for a delinquent bill when an error was made in the set-up of the customers high-speed data account; and (3) a rate increase for cable modem customers who purchased their own modem (rather than leasing from the local cable operator) to offset the operator's long-term investment. If the Commission preempts the local government's authority to regulate cable modem operators, none of these complaints could be addressed by the local government entity.

The elimination of franchise fees is also problematic. While cable modem operators and other industry members have claimed that local governments charge excessive fees for use of the ROW, the fees charged for access to the ROW serve a multitude of important public functions. Fees for ROW access offset the increased costs associated with the addition of another ROW user or upgrades and improvements by existing ROW users. For example, ROW fees support:

- construction supervision, engineering support, damage control and restoration
- safety programs for ROW obstruction, traffic control, and utility location;
- administration costs for permitting;
- local programming, channels, training and support for citizen use of cable T.V. and Internet communications;
- institutional networks for advanced public voice, video and data applications;
- customer complaints and education; and
- dispute resolution.

If the Commission preempts the local government's authority to charge cable modem operators a fee for ROW use, it will result in a significant loss of revenue for these services without

diminishing the burden on the ROW. As noted before, the *Declaratory Ruling* makes no provision for an alternative means of providing these services and effective regulation of cable modem operators.

Any new forum created to regulate the provision of cable modem service will be costly and duplicative when compared to the existing regulatory structure provided by the local governments. In particular, cable modem customers will need to be educated regarding the appropriate forum to bring a complaint. Because the local government is the entity listed on the customer's cable bill, it is likely that customers will continue to contact the local government for dispute resolution.

B. Continued Local Government Authority Over Cable Modem Service is Necessary to Ensure Open Access

The Commission has requested comments on the continued viability of local governments to impose access requirements on cable modem service, and whether the exercise of such authority is consistent with its own jurisdiction.[59] Local governments have long had the authority to regulate businesses that operate within their corporate boundaries for the public good.[60] This authority is granted under state law, and cannot be altered unless preempted by the Commission. The City Coalition asserts that the Commission should not preempt local government's authority to regulate cable modem service, because such regulation is consistent with the goals of the Cable and Communications Act.

[59] *Declaratory Ruling,* at ¶ 100.

[60] 7 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.322 (3d ed. 1997) (stating that local governments have the authority to prevent businesses, industries, trades and occupations from injuring or menacing the public health, safety, morals, order, welfare and convenience).

For example, previous local government regulation of cable modem service has ensured the following important public policy goals:

- nondiscriminatory access to transport facilities by unaffiliated ISPs;[61]
- prevention of content control and routing by cable operators;[62]
- promotion of competition among different service providers by ensuring a level playing field;[63]
- requirement of variety in the delivery of programming services; and[64]
- assurance of the even development and deployment of broadband services.[65]

Because of their size and proximity, local governments have more flexibility to tailor regulations to reflect circumstances of the individual local market and to further the goals of the Cable and Communications Act.

Without providing more than a handful of random examples, some commenters have claimed that previous regulation by local governments has been unreasonable, and as such, contrary to the policy goals of the Cable and Communications Act. However, no one has claimed that all regulation by local governments of cable modem service is unreasonable. Based on the few cited examples of egregious behavior, total preemption of local authority is a drastic and unreasonable remedy.

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[61] *See* 47 USC § 521(6) (stating that one of the purposes of the Cable Act is to "promote competition").

[62] *See* 47 USC § 521 (4) (stating that the Commission must "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public").

[63] *See* PUB. L. NO. 104-104, 110 Stat. 153 (1996), reproduced in the notes under 47 USC § 157 (stating that the Commission should "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "regulatory forbearance, measures that promote competition…, or **other regulating methods that remove barriers to infrastructure investment**") (emphasis added).

[64] *See* 47 USC § 521 (4).

[65] *See* 47 USC § 157.

Cable operators already have alternative means of addressing any instance of unreasonable regulation by a local government entity. An unreasonable ordinance is invalid as a matter of law. Any cable operator who believes that it is subject to unreasonable regulation by a local government has the right to appeal to the state judiciary. The state judiciary would then review the disputed regulation against the local government's grant of authority for an abuse of power. It is not appropriate to assume, based on this record, that all regulation by all local governments is unreasonable and should be preempted by the Commission.

The local regulation of cable modem operators serves an important public purpose. For this reason, the Commission should not eliminate regulation by the local government. To do so will promote the development of an unregulated monopoly power in the provision of cable modem service without appropriate oversight. Even if the Commission assumes the responsibility of regulating cable modem service, significant conflicts are certain. Because both cable service and cable modem service utilize the same physical network, regulation by separate entities will at best be inefficient and duplicative.

IV. FRANCHISE FEES ARE LEGITIMATE LOCAL TAXES ON ROW USE

In the *Declaratory Ruling* the Commission's classification of cable modem service as an "information service" raises the issue of whether a refund of past franchise fees is due.[66] The Commission has requested comments on whether it is appropriate to exercise its jurisdiction to resolve the issue of refunding previously collected franchise fees.[67] The City Coalition asserts that it is not.

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[66] *Declaratory Ruling,* at ¶ 106.

[67] *Declaratory Ruling,* at ¶ 107.

Local governments have authority independent from the Cable Act to collect a fee for the use of the public ROW.[68] The scope of this authority stems from each local government's enabling legislation or charter.[69] The Commission should not adjudicate the validity of each local government's exercise of its independent authority under state law. Disputes regarding the scope of such authority are best left to the state courts which are most familiar with the extent of local government power.

Funds generated from past collections of franchise fees have been used to further important public purposes, such as maintaining the ROW and the resolution of customer complaints. These funds are spent, and no longer available to either the local government or its citizenry. Under these circumstances, imposing a refund would constitute an unnecessary hardship on local governments.

Processing a refund of past franchise fees would also be a logistical nightmare. The identification of past customers (who may or may not continue to live within the local government's corporate boundaries), and the arithmetic exercise of calculating the amount of refund owed each customer would create a considerable administrative burden for the Commission. In addition, disputes regarding the validity of any refund determination, the methodology used and the amount owed are likely from any or all of the affected parties.

For all of these reasons, the Commission should not assert its jurisdiction over the determination of a refund of previously collected franchise fees.

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[68] 12 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.37 (3d. ed. 1997) *citing St. Louis v. Western Union Tel. Co.,* 149 US 465, 13 S.Ct. 990 (1893).

[69] Some state laws require that a grant to use the public ROW occur only for consideration of profit to the local government. *See* 12 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.37 (3d ed. 1997).

CONCLUSION

For the foregoing reasons, the City Coalition urges the Commission to recognize the provision of cable modem service as "cable service" and not an "information service." Should the Commission retain the information service classification for cable modem service, it should avoid infringing upon the local government's authority to regulate the public ROW and the provision of cable modem service. Local regulation promotes the goals contained in the Cable and Communications Act, and is an important aspect of customer protection.

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Respectfully submitted,

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